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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JOSE DANIEL FLORES, Defendant and Appellant.	F077500 (Super. Ct. No. VCF319740) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Tulare County. Joseph A. Kalashian, Judge. (Retired Judge of the Tulare County Sup. Ct. assigned by the Chief Justice pursuant to article VI, § 6 of the Cal. Const.)

Carlo Andreani, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Darren K. Indermill and Cameron M. Goodman, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Levy, Acting P.J., Snauffer, J., and DeSantos, J.

INTRODUCTION

Appellant Jose Daniel Flores began living with a woman he met at a party. The woman had several children, including two daughters aged 11 and 5. Flores frequently touched the 11-year-old's breasts. On one occasion, with the mother surreptitiously observing, Flores moved his hand in an upward motion under the dress and over the leggings of the five-year-old daughter's genital area. The mother grabbed a knife from the kitchen and accused Flores of touching the girl before he passed out from intoxication. The first jury trial resulted in a mistrial on all counts. Upon retrial, the jury found Flores guilty of three lewd and lascivious acts upon the older girl but, again, could not return a unanimous verdict as to the younger girl. The court dismissed the two counts relating to the younger girl and sentenced Flores to 10 years.

Flores's sole contention on appeal is that the trial court's instruction on CALCRIM No. 1191B violated his constitutional right to be convicted of a criminal offense only by proof beyond a reasonable doubt. The instruction allowed propensity evidence of other charged offenses to be used when determining guilt of a sexual offense, but the jury could use a charged offense for propensity only if it first found Flores guilty of the charged offense by proof beyond a reasonable doubt. Flores's claim of error fails due to our Supreme Court's decision in *People v. Villatoro* (2012) 54 Cal.4th 1152 (*Villatoro*); consequently, Flores urges reconsideration of *Villatoro*.

STATEMENT OF THE CASE

On January 12, 2017, the Tulare County District Attorney filed a first amended information alleging Flores, in counts 1 through 5, committed five lewd acts upon a child (Pen. Code, § 288, subd. (a)).[1] Counts 1 through 3 alleged acts against A.V., while counts 4 and 5 alleged acts against M.V. As to all counts, the first amended information contained a special allegation that there were multiple victims under 14 years of age

[1] Undesignated statutory references are to the Penal Code.

(§ 667.61, subds. (j)(2) & (e)). As to counts 4 and 5, the first amended information contained an additional special allegation that the offenses constituted substantial sexual conduct (§ 1203.066, subd. (a)(8)).

On August 29, 2017, the first jury trial commenced. On August 31, 2017, the jury informed the court it could not reach a verdict, and the trial court declared a mistrial.

On April 10, 2018,[2] the second jury trial commenced. On April 16, the jury returned guilty verdicts on counts 1 through 3. The trial court declared a mistrial on counts 4 and 5 following the jury's inability to reach a verdict. On May 14, the prosecutor dismissed counts 4 and 5 and the special allegations on all counts.

On May 14, the trial court sentenced Flores to the midterm of six years on count 1, one-third the midterm, two years consecutive, on count 2, and one-third the midterm, two years consecutive, on count 3 for a cumulative 10-year state prison sentence.

On May 14, Flores filed a notice of appeal.

STATEMENT OF FACTS

A. Prosecution Case-in-Chief

In October 2014, A.G. (mother), a Visalia resident, met Flores at a party, drank with him, and developed romantic feelings for him. After the party, she brought him to her residence, where four of her children lived with her. Among these children were A.V., age 11, and M.V., age five. Mother introduced Flores to her children and told them he was "the person that was going to live with me." Mother testified that M.V. viewed Flores as a father and said her children thought "he was their father that had left."

At the beginning of the relationship, they went to church together. Flores would frequently hug mother's female children, mainly A.V. Flores and mother argued often. Flores was "aggressive" and "rude," especially when he drank. He would often move out

[2] Subsequent references to dates are to dates in 2018 unless otherwise stated.

and then move back in with mother. Their dating relationship ended in February 2015, but mother continued to text Flores.

A.V. remembered Flores as her mother's ex-boyfriend who moved in quickly after a party. Flores gave her a "bad vibe." He "would always touch [her] breasts" with his hands. On one occasion, A.V. and her siblings watched a movie in their mother's bedroom with Flores. All her siblings left, and as she tried to leave the room with them, Flores grabbed her arm, touched her breasts, and smiled. A.V. felt "angry" and "disgusted" with Flores. On another occasion, Flores touched her breast while outside the house. At a later time, Flores whispered "eres mi pepita" in A.V.'s ear, which A.V. understood to mean "you're my vagina."

In March or April of 2015, A.V. told her mother's friend, A.R., that Flores had touched her inappropriately. A.R. immediately told mother. Mother became "angry" and "mad" and texted Flores, who did not respond. Flores took his property from the house that night and left. Mother did not call police because she wanted more evidence, had been physically threatened by Flores, and "wanted to do justice with [her] own hands."

Flores returned on Father's Day weekend to see the children. Five of mother's children were in the house that weekend. Flores stayed for two days and drank beer "like water." Mother drank about six beers during the weekend. On Sunday, June 21, 2015, M.V. sat on Flores's leg. Mother hid behind a wall to surreptitiously watch Flores. M.V. wore a dress with leggings underneath the dress and underwear underneath the leggings. Flores used his hand to reach under the dress and rub M.V.'s private part on top of the leggings. Mother grabbed a kitchen knife and confronted Flores; he provided no response. Mother instructed B.V., her oldest daughter, to call the police.

At about 8:05 p.m., Officer Amerie Norman with the Visalia Police Department arrived at the house and contacted the occupants for a child molestation report. Flores was passed out and "extremely intoxicated" at the kitchen table. Both A.V. and M.V. talked to Officer Norman. M.V. specifically gestured that Flores had touched the "front

portion of her body in her vaginal area" by repeatedly moving his hand upward from her lower thigh. Mother claimed to have witnessed Flores's acts with M.V. and described earlier inappropriate acts but admitted not calling police for fear of losing her children. Flores was arrested and transported to jail.

Detective Celestina Sanchez of the violent crimes unit investigated the case against Flores. She observed interviews, where M.V. and A.V., separately, were interviewed by an investigator. Following their interviews, each victim separately identified Flores as the person who had touched her inappropriately from a single photo of Flores.

B. Defense Case

S.R. had known Flores for about 10 years as of the date of trial. She knew Flores when he dated mother. S.R. interacted with the couple at home and at church. She saw mother drink and yell at her children. Mother told her she planned to marry Flores and wanted S.R.'s help with the wedding. Flores also told S.R. he intended to marry mother. According to S.R., mother stated she would get "vengeance" against Flores if he did not marry her.

Flores testified in his own defense. Born in April 1978 and nearly 40 at the time of trial, he described meeting mother at a party and then being driven, without his consent, to her apartment. Mother suggested they could drink at the apartment, but Flores did not want to because of her children. The next morning, a Monday, Flores woke up to mother telling the children he was their "true father," and one of the children protested his lengthy absence from the family. In December, Flores rented a house for mother and her children to live in with him. Flores admitted he drank but remembered mother leaving the apartment all weekend to drink. He and mother frequently argued. Flores threatened to leave, and mother threatened he would be "sorry the rest of [his] life" if he left. Flores repeatedly moved out and back in the house in spite of his purported concern with mother's behavior around the children. He recalled mother had attempted

to fabricate a molestation allegation, but B.V., mother's daughter, refused to call police with the lie.

Flores admitted mother told him not to be so affectionate with the female children. He asked the girls for "a tongue kiss." On April 18, 2015, Flores claimed mother left the house and returned with friends to beat him up. He recalled that on May 9 or 10, 2015, mother texted him about molesting A.V. following a fight over mother's taking a cooler of beer. Flores left the house thereafter but returned on Father's Day weekend after mother texted him that the children would be sad without him. He brought a 36-can case of beer to the house and, after he arrived, went with mother to buy 12 more cans "in case … we would drink the 36." He and mother drank the entire night and he woke up at noon on Father's Day. M.V. sat on his lap, and mother soon accused him of molesting the girl.

Flores did not recall being advised of his rights to remain silent and to have an attorney when interviewed by a police officer. He remembered telling the officer about the April 18 and May 9 incidents but accused the officer of not wanting to listen to him. Flores admitted never telling the officer mother had his phone. Flores admitted he did not mention the April 18 or May 9 incidents or that mother had taken his phone when he previously testified in the case since he claimed he was not allowed to speak. Flores conceded he called mother's daughters "beautiful thing" but denied calling them his "sweet little thing" or his "piece of cinnamon." Flores denied touching A.V.'s breasts or M.V.'s genitals.

C. Rebuttal Case

Officer Henry Martinez conducted a Spanish-language interview with Flores at Visalia police headquarters following his arrest. Martinez fully advised Flores of his *Miranda*[3] rights. Flores described waking up to police being present after mother, whom

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[3] *Miranda v. Arizona* (1966) 384 U.S. 436.

he described as his "wife," called them. Flores admitted drinking all weekend. He described carrying M.V. on his lap before being accused by mother of inappropriate touching. He claimed he went to bed but did not tell Officer Martinez police found him passed out and intoxicated at the kitchen table. Flores also mentioned a prior accusation of inappropriate touching resulted in him being kicked out of the residence.

Flores stated he and mother had been together for about eight months. He described affection for her children, especially M.V. and A.V., and admitted he "would hug them, kiss them, and . . . call them names, like little cinnamon, little baby," and "sweet little thing." He said he asked for tongue kisses but never received any. Flores never told Officer Martinez mother had threatened to ruin his life if he left or that she had taken his cell phone.

DISCUSSION

Flores argues instruction on CALCRIM No. 1191B violated his constitutional right to have all counts proved with guilt beyond a reasonable doubt and, recognizing California Supreme Court precedent squarely in conflict with this argument, urges reversal of *Villatoro*, *supra*, 54 Cal.4th 1152. Respondent asserts (1) Flores failed to object to the instruction below, forfeiting the issue; (2) substantively, *Villatoro* was properly decided, making CALCRIM No. 1191B a proper jury instruction in the context of Flores's case; and (3) any supposed error was harmless beyond a reasonable doubt since, even absent the instruction, Flores indisputably would have been convicted on counts 1 through 3.

A. Procedural History

On April 12, 2018, the trial court discussed jury instructions with both attorneys, and Flores' s trial counsel made no objection to CALCRIM No. 1191B. The court instructed the jury following the close of evidence. Among these instructions was CALCRIM No. 1191B, which states:

> The People presented evidence that the defendant committed the crimes of Lewd and Lascivious Act Upon a Child: Under 14 Years as charged in Counts 1-5.
>
> If the People have proved beyond a reasonable doubt that the defendant committed one or more of these crimes, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit sexual offenses, and based on that decision, also conclude that the defendant was likely to commit and did commit the other sex offenses charged in this case.
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> If you find that the defendant committed one or more of these crimes, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that defendant is guilty of another crime. The People must still prove each charge and allegation beyond a reasonable doubt.

B. Standard of Review

A criminal trial court must provide correct jury instructions on the general legal principles of the evidence presented. (*People v. Michaels* (2002) 28 Cal.4th 486, 529-530.) De novo review is appropriate for a contention of instructional error. (*People v. Manriquez* (2005) 37 Cal.4th 547, 581.)

C. Appellant Forfeited this Argument by Failing to Object Below

"[F]ailure to object to instructional error forfeits the objection on appeal unless the defendant's substantial rights are affected." (*People v. Mitchell* (2008) 164 Cal.App.4th 442, 465 (*Mitchell*), citing § 1259 and *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1192-1193.) "Substantial rights" implicate reversible miscarriages of justice under *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*). (*Mitchell, supra,* at p. 465.) Forfeiture applies with equal weight to claims of statutory errors and infringement of fundamental constitutional rights. (*In re Seaton* (2004) 34 Cal.4th 193, 198.) The rule of forfeiture intends to prevent a criminal defendant from having "two bites at the apple," stated in other words as failing to object at trial, raising the error for the first time on appeal, obtaining reversal due to the error, and having a better chance of acquittal upon retrial. (*Id.* at pp. 198-199.)

In *People v. Cruz* (2016) 2 Cal.App.5th 1178 (*Cruz*), this court declined to apply the forfeiture rule to an instructional error claim based on a modified version of CALJIC No. 2.50.01, a predecessor to CALCRIM No. 1191B. *Cruz* reached the merits of the claim because it was unable to determine whether the found error was "reversibly erroneous" without first doing so. (*Cruz*, at p. 1183.) The problematic instruction read:

> In determining whether defendant has been proved guilty of any sexual crime of which he is charged, you should consider all relevant evidence, including whether the defendant committed any other sexual crimes, whether charged or uncharged, about which evidence has been received. The crimes charged in counts 1, 2, and 3 may be considered by you in that regard. [¶] . . . [¶]
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> "Sexual offense" means a crime under the laws of a state or of the United States that involves any of the following: [A]ny conduct made criminal by Penal Code Sections 261.5 Subdivision (d), 12022.7 Subdivision (a), and 288 Subdivision (a). [¶] The elements of Penal Code Section 288 Subdivision (a) are set forth elsewhere in these instructions.
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> If you find, by a *preponderance of the evidence*, that the defendant committed any such other sexual offense you may, but are not required to, infer that the defendant had a disposition to commit sexual offenses. [¶] If you find that the defendant had this disposition you may, but are not required to, infer that he was likely to commit and did commit the crime or crimes of which he is accused. [¶] However, even though you find by [a] preponderance of the evidence that the defendant committed another sexual offense, that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged crimes you are determining. [¶] If you determine an inference properly can be drawn from this evidence, this inference is simply one item for you to consider along with all other evidence in determining whether the defendant has been proved guilty beyond a reasonable doubt of the charged crimes that you are determining. [¶] You must not consider this evidence for any other purpose. (*Cruz*, at pp. 1183-1184, italics added.)

Flores's claim is distinguishable in that no error occurred. At no point in providing CALCRIM No. 1191B did the trial court instruct the jury it could find Flores committed any charged offenses by a preponderance of the evidence. Accordingly, unlike *Cruz*, forfeiture is appropriate. Flores's failure to object to any instructional error

below regarding CALCRIM No. 1191B forfeited the issue on appeal. Accordingly, this court would be justified in not reaching the merits; however, we also reject the claim for the reasons set forth below.

D. The Jury Received Proper Instruction on Reasonable Doubt

The Due Process Clause of the Fourteenth Amendment requires proof beyond a reasonable doubt for guilt of a criminal offense. (*In re Winship* (1970) 397 U.S. 358, 358-361, 368.) In California, section 1096 statutorily requires a criminal conviction to be based on proof beyond a reasonable doubt, and Evidence Code section 502 requires instruction on the burden of proof and the applicable standard of proof. (*People v. Aranda* (2012) 55 Cal.4th 342, 353 (*Aranda*).) Consequently, instruction with CALJIC No. 2.90 or CALCRIM No. 220 satisfies a trial court's obligation when instructing on reasonable doubt. (*Aranda*, *supra*, at pp. 353-354.) Flores does not dispute that the trial court instructed the jury with CALCRIM No. 220. Thus, the jury received proper instructions on reasonable doubt in compliance with Flores's constitutional and statutory rights.

E. CALCRIM No. 1191B Was a Proper Instruction Under the Circumstances, and *Villatoro* is Binding upon this Court

Generally, character evidence is inadmissible to prove conduct in conformity therewith during a specified occasion. (Evid. Code, § 1101, subd. (a).) However, in a criminal case involving a sexual offense, "evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by [Evidence Code section] 1101," subject to balancing under Evidence Code section 352. (Evid. Code, § 1108, subd. (a)).

Evidence Code section 1108 allows a jury to consider a defendant's charged and uncharged sexual offenses as propensity evidence. (*Villatoro*, *supra*, 54 Cal.4th at p. 1164.) The legislative history and intent of Evidence Code section 1108 emphasizes the probative value of this propensity evidence in determining a victim's credibility.

(*Villatoro*, at p. 1164.) Consequently, when the case involves a sex offense, "the Legislature has made the careful determination that evidence the defendant committed one or more sex offenses may be properly considered pursuant to [Evidence Code] section 1108." (*Villatoro*, at p. 1165.)

In *Villatoro*, the jury was instructed as follows:

> The People presented evidence that the defendant committed the crime of rape as alleged in [multiple counts] and the crime of sodomy as alleged in [a single count]. These crimes are defined for you in the instructions for these crimes. [¶] If you decide that the defendant committed one of these charged offenses, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit the other charged crimes of rape or sodomy, and based on that decision also conclude that the defendant was likely to and did commit the other offenses of rape and sodomy charged. If you conclude that the defendant committed a charged offense, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove the defendant is guilty of another charged offense. The People must still prove each element of every charge beyond a reasonable doubt and prove it beyond a reasonable doubt before you may consider one charge as proof of another charge. (*Villatoro*, *supra*, 54 Cal.4th at p. 1167 [quoting instruction on modified version of former CALCRIM No. 1191].)[4]

Rejecting the defendant's argument that the instruction failed to designate the appropriate standard of proof for the charged offenses before the jury could use them as propensity evidence, the *Villatoro* court found the instruction "clearly told the jury that all offenses must be proven beyond a reasonable doubt, even those used to draw an inference of propensity." (*Id.* at pp. 1167-1168.)

The jury instruction provided below was essentially identical to the one approved in *Villatoro*. The jury was instructed that guilt on any count had to be based on proof beyond a reasonable doubt. Once the jury found this as to one count, the instruction

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[4] In March 2017, CALCRIM No. 1191 was replaced by CALCRIM No. 1191A (Evidence of Uncharged Sex Offense) and CALCRIM No. 1191B (Evidence of Charged Sex Offense). (*People v. Gonzales* (2017) 16 Cal.App.5th 494, 496, fn. 1.)

permitted the jury to draw an inference of propensity to commit other sexual offenses. Nevertheless, the instruction reminded the jury that guilt on one count was not alone sufficient to find guilt on any other count. Nothing in this instruction expressed or implied to the jury that Flores's guilt on any count could be based on less than proof beyond a reasonable doubt.

Under *Villatoro*, Flores's claim of error clearly fails; hence, Flores urges reconsideration. He cites the four-to-three vote in *Villatoro* and Justice Corrigan's partial dissent as grounds for reconsideration. No inferior California court may rule contrary to the law decided by a higher California court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455-456 (*Auto Equity*).) Accordingly, *Villatoro* controls as a majority opinion, regardless of a bare majority or the language of any dissenting opinion. Under *Auto Equity*, we may not reconsider the validity of *Villatoro*.[5]

As to the substantive merits of adherence to *Villatoro*, its reasoning comports with the federal Constitution and state law. Instruction on CALCRIM No. 1191B properly allows a jury to consider propensity evidence based on guilt of a charged sex offense while nevertheless requiring any charged offense to be proved beyond a reasonable doubt before it can be considered.

F. No Error Occurred Under Federal Law

A state law permitting propensity evidence does not clearly run afoul of due process under the federal Constitution. (*Estelle v. McGuire* (1991) 502 U.S. 62, 75, fn. 5 [discussing prior crimes evidence for propensity].) Moreover, Evidence Code section 1108 has been found constitutional by the Supreme Court of California, and the Ninth Circuit has upheld its federal counterpart as constitutional. (*People v. Loy* (2011) 52 Cal.4th 46, 60-61, citing *People v. Falsetta* (1999) 21 Cal.4th 903, 910-922

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[5] Indeed, Flores concedes that we are bound to follow *Villatoro*, and that his argument herein is a "prelude" to review by the California Supreme Court.

[constitutionality under state and federal law] and *United States v. LeMay* (9th Cir. 2001) 260 F.3d 1018, 1024-1027 [federal constitutionality of Fed. Rules. Evid., rule 414, 28 U.S.C.].) Accordingly, no interpretation of federal constitutional law indicates error with instruction on CALCRIM No. 1191B.

G. Any Error Was Harmless, Since the Prosecution's Burden of Proof Was Not Lowered for Any Charged Offense

Federal constitutional error mandates reversal of a conviction unless "harmless beyond a reasonable doubt." (*Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*).) Under *Chapman*, the proper test is "not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.) For error arising solely under California law, error mandates reversal only if a reasonable probability exists of a more favorable result to the complaining party without the error. (*Watson, supra,* 46 Cal.2d at p. 836.)

Under either *Chapman* or *Watson*, any error was harmless. A.V.'s testimony, corroborated by both her mother and the investigating officers, provided substantial evidence Flores committed counts 1 through 3. CALCRIM No. 1191B did not play a pivotal role in the jury's verdict. Crucially, the jury's lack of guilty verdicts on counts 4 and 5, where M.V. was the victim, suggests the credibility of each victim's testimony, as opposed to mere propensity, most probably influenced the jury's verdict. The jury focused more on what the evidence stated or suggested than on Flores's predisposition to commit a sexual offense based on his commission of another sexual offense. Moreover, nothing suggests Flores's guilt on counts 1 through 3 was grounded on anything less than proof beyond a reasonable doubt. Any purported error caused by instruction with CALCRIM No. 1191B was harmless.

DISPOSITION

The judgment is affirmed.